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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WOELKE & ROMERO FRAMING, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD; CARPENTERS LOCAL NO. 944, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO; and CARPENTERS LOCAL NO. 235, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO,

Respondents.

BRIEF ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AS *AMICUS CURIAE*, IN SUPPORT OF PETITION FOR CERTIORARI

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BRIEF ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AS *AMICUS CURIAE*, IN SUPPORT OF PETITION FOR CERTIORARI

Interest of *Amicus Curiae*

The Chamber of Commerce of the United States of America is a federation consisting of a membership of over 2,600 state and local Chambers of Commerce, 1,200 trade and professional associations, and a direct business membership in excess of 75,600. It is the largest association of business and professional organizations in the United

States. The Chamber regularly represents the interests of its member-employers in important labor relations matters before the courts, the United States Congress, the Executive Branch and independent regulatory agencies of the federal government. Such representation constitutes a significant aspect of the Chamber's activities. Accordingly, the Chamber has sought to advance those interests in a wide spectrum of labor relations litigation.[1]

The questions presented by the instant case are of vital concern to the Chamber and its members. The Chamber participated in the litigation of this case before the National Labor Relations Board and the United States Court of Appeals for the Ninth Circuit as an amicus.

One of the questions squarely presented by the facts of this case is whether a labor organization may lawfully picket or strike to obtain a subcontracting clause, even where such clause may be lawful pursuant to the construction industry proviso to Section 8(e) of the National Labor

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[1] E.g., *Carbon Fuel Co.* v. *Mine Workers, UMW*, 444 U.S. 212 (1979); *New York Telephone Co.* v. *New York State Department of Labor*, 440 U.S. 519 (1979); *N.L.R.B.* v. *Enterprise Association, etc.*, 429 U.S. 507 (1977); *Buffalo Forge* v. *Steelworkers*, 428 U.S. 397 (1976); *Connell Construction Co., Inc.* v. *Plumbers and Steamfitters Local Union 100*, 421 U.S. 616 (1975); *Gateway Coal Company* v. *United Mine Workers of America, et al.*, 414 U.S. 268 (1974); *William E. Arnold Co.* v. *Carpenters District Council of Jacksonville, etc., et al.*, 417 U.S. 12 (1974); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974); *Super Tire Engineering Company, Supercap Corporation and A. Robert Schaevitz* v. *Lloyd W. McCorkel, et al.*, 416 U.S. 115 (1974); *N.L.R.B.* v. *Bell Aerospace Company Division of Textron, Inc.*, 416 U.S. 267 (1974); *Boys Market* v. *Retail Clerks Union*, 398 U.S. 235 (1970); *N.L.R.B.* v. *Granite State Joint Board*, 490 U.S. 213 (1972); *N.L.R.B.* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 517 (1971).

Relations Act, 29 U.S.C. §158(e). Or, as stated by petitioner in its "Questions Presented":

> "3. Does Section 8(b)(4)(A) of the National Labor Relations Act, 29 U.S.C. §158(b)(4)(A), prohibit a union from engaging in 'top down' organizing by striking or picketing to force a contractor to execute an agreement containing a union signatory contractor clause otherwise protected by the construction industry proviso to Section 8(e) of the Act?"

This question must be answered before consideration of the other questions presented.

The Chamber regards this issue as the most significant in the §8(e) area. Moreover, it has not been passed upon by this Court since Congress enacted the 1959 amendments, despite the fact that the current law, as enforced by the NLRB and circuits, overturns *Sand Door*.[2] Therefore, this brief will focus upon that question, and that question alone.

Clearly, the Chamber, whose members are buyers of construction and who must ultimately bear the costs arising from such restrictive and anti-competitive provisions, has a continuing and vital interest in the outcome of this litigation.

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[2] *Carpenters Local 1976* v. *N.L.R.B. (Sand Door)*, 357 U.S. 93 (1958).

Summary of Argument

Amicus, in support of the petitioner, urges that certiorari be granted on each of the various questions posed by petitioner. However, the threshold question to be decided is whether an agreement which is otherwise protected by the construction industry proviso to Section 8(e) of the Act may lawfully be sought by coercive activity. In response to this question, petitioner and amicus maintain that the construction industry proviso to Section 8(e) permits only *voluntary* agreements entered into within the context of a collective bargaining relationship.

The principles enunciated by this Court in *Denver Building Trades,*[3] *Sand Door,* and other pre-1959 authorities were not disturbed by the 1959 amendments. Therefore, construction industry unions gained no greater rights by the enactment of Section 8(e) than they enjoyed prior thereto. What was unlawful then (coercion to obtain an 8(e) agreement) is unlawful now. As such conduct is outside the protection of the construction industry proviso, it violates the secondary boycott provisions of the Act.

The National Labor Relations Board continued to follow these principles in a long line of cases after the 1959 amendments, beginning with its decision in *Construction, Production & Maintenance Laborers Local 1383 (Colson & Stevens),* 137 NLRB 1650 (1962). However, following the lead of some circuit courts, in 1964 the Board reversed its long-standing position. *Northeastern Indiana Building & Construction Trades Council (Centlivre Village Apartments),* 158 NLRB 854 (1964). That decision spawned and opened the floodgates to "top down" organizing efforts con-

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[3] *N.L.R.B.* v. *Denver Building & Construction Trades Council,* 341 U.S. 675 (1951).

demned by this Court in *Connell.* As noted in *Connell,* the facts of that case did not warrant the Court's examination of this most important and seminal issue because the conduct in which the union engaged did not take place within the context of a collective bargaining relationship. Here, that issue is clearly presented, and perhaps for the last time. Accordingly, amicus considers the granting of this petition to be of the utmost importance to the construction industry and the vast numbers of construction purchasers whose interests are advanced by the Chamber.

ARGUMENT

Certiorari should be granted in this case to resolve the question whether a construction industry labor organization may picket or strike to obtain a "hot cargo" subcontractor agreement, or whether Section 8(e) permits only agreements entered into voluntarily by the parties.[4]

In *Connell,* the Supreme Court acknowledged Connell's contention that the construction industry proviso authorizes *only voluntary agreements.* However, because the Court found the agreement outside the protection of the Section 8(e) provisio, as it did not arise within the context of a collective bargaining relationship, the Court found it unnecessary to consider this contention, leaving the issue for resolution in another setting. *Connell Construction Co., Inc.* v. *Plumbers & Steamfitters Local 100,* 421 U.S. 616,

[4] Amicus adopts and supports the brief of petitioner with regard to other asserted grounds for the granting of certiorari in this case.

634, n. 14.[5] This very issue of law now is squarely presented by the facts of this case, and may represent the last opportunity the Court will have to rule upon this critical question.

Subsequent to the 1959 amendments, *a unanimous five-member Board* in *Construction, Production and Maintenane Laborers Local 1383 (Colson & Stevens)*, 137 NLRB 1650 (1962), reversed in part 323 F.2d 422 (9th Cir. 1963), held that it was unlawful to strike to obtain a subcontracting clause, even where such clause, if voluntarily entered, would be protected by the construction industry proviso. The Board followed that ruling in a long line of cases, including:

Local 825, Operating Engineers (Building Contractors Association of New Jersey), 145 NLRB 952 (1964).

Local 300, Hod Carriers Union (Fiesta Pools, Inc.), 145 NLRB 911 (1964).

Los Angeles Building Trades Council (Treasure Homes), 145 NLRB 279 (1963).

Southern Calif. District of Laborers (Swimming Pool Gunnite Contractors), 144 NLRB 978 (1963).

Los Angeles Building and Construction Trades Council (Stockton Plumbing Co.), 144 NLRB 49 (1963).

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[5] The Court said: "Connell also has argued that the subcontracting agreement was subject to antitrust sanctions because the construction-industry proviso authorizes only voluntary agreements. The foundation of this argument is a contention that §8(b)(4)(B) forbids picketing to secure an otherwise lawful 'hot cargo' agreement in the construction industry. Because we hold that the agreement in this case is outside the §8(e) proviso, it is unnecessary to consider this alternative contention." (421 U.S. 616, n. 14)

Essex County and Vicinity District Council of Carpenters, 141 NLRB 858 (1963).

Los Angeles Building & Construction Trades Council (Interstate Employers, Inc.), 140 NLRB 1249 (1963).

Operating Engineers Union (Sherwood Construction Co.), 140 NLRB 1175 (1963).

Building and Construction Trades Council of Orange County (Sullivan Electric Company), 140 NLRB 946 (1963).

Local Union 825, Operating Engineers (Nichols Electric Company), 140 NLRB 458 (1963).

Building and Construction Trades Council of San Bernardino, etc. (Gordon Fields), 139 NLRB 236 (1962).

Local 60, United Association of the Plumbing & Pipefitting Industry (Binnings Construction Co., Inc.), 138 NLRB 1282 (1962).

Because some circuits rejected that view, in *Northeastern Indiana Building & Construction Trades Council (Centlivre Village Apartments)*, 148 NLRB 854 (1964), the Board reversed its position.[6] Unfortunately, at the time these circuit court cases were decided, the charging party

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[6] *Construction, Production & Maintenance Laborers Union, Local 383, et al.* v. *N.L.R.B. (Colson & Stevens Construction Co.)*, 323 F.2d 422 (9th Cir. 1963); *Essex County & Vicinity District Council of Carpenters & Millwrights, United Brotherhood of Carpenters, etc. (Associated Contractors of Essex County, Inc.)* v. *N.L.R.B.*, 332 F.2d 636 (3d Cir. 1964); *Orange Belt District Council of Painters No. 48, AFL-CIO, et al. (Calhoun Drywall Co.)* v. *N.L.R.B.*, 328 F.2d 534 (D.C.Cir. 1964); *Building and Construction Trades Council of San Bernardino and Riverside Counties, et al. (Gordon Fields)*, 328 F.2d 540 (D.C.Cir. 1964). See also, *Local Union No. 48 of Sheet Metal Workers* v. *Hardy Corp.*, 332 F.2d 682 (5th Cir. 1964).

in a labor board proceeding was not considered a party for the purposes of review in the circuit courts, but merely an amicus curiae. Thus, if the Board chose not to seek certiorari, there was nothing the charging party could do on its own initiative. Not until the decision of this Court in *United Automobile Workers* v. *Scofield*, 382 U.S. 205 (1965), was that situation corrected and the charging party granted standing to intervene in courts of appeal proceedings for the review or enforcement of labor board orders; and having intervened, to enjoy the status of a party with the right to seek certiorari independent of the Board.

Obviously, after *Centlivre* (decided one year before *Scofield*), the General Counsel declined to issue any further complaints alleging a violation of Section 8(b)(4)(A) where a union sought to compel the execution of an 8(e) agreement. Thus, the issue was smothered and could not be raised before this Court until *Connell* and the litigation created by *Connell*, such as the instant case. Perforce, this Court has never had, and it may never again have, the opportunity to rule upon this critical question.

By permitting building trade unions to extract subcontracting agreements by coercive means, the Board and the circuit courts have overruled *Sand Door* and permitted massive unchecked secondary activity that runs counter to all the concerns and principles that are the underpinnings to *Denver Building Trades, General Electric,*[7] *National Woodwork,*[8] and *Enterprise.*[9] This state

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[7] *Local 761, International Union of Electrical, Radio & Machine Workers, AFL-CIO,* v. *N.L.R.B.*, 366 U.S. 667 (1961).

[8] *National Woodwork Mfrs. Ass'n* v. *N.L.R.B.*, 386 U.S. 612 (1967).

[9] *N.L.R.B.* v. *Enterprise Association, etc.*, 429 U.S. 507 (1977).

of the law has unleashed the problems which gave birth to *Connell* and its progeny. It cannot be over-emphasized that the five-member Board that unanimously decided *Colson & Stevens* (the so-called "Kennedy Board") is the very same Board that in less than one year departed from precedent favorable to management in thirteen cases, in some instances recalling decisions for reconsideration and ultimate reversal.[10] *Nevertheless, that same Board was of one mind in holding that only those "hot cargo" agreements which are the product of voluntary action are lawful under §8(e).*

The instant case poses the underlying question left unanswered by *Connell.* In the "hot cargo" and construction industry secondary boycott area of labor law, it is the most significant issue to come before this Court since the enactment of Section 8(e) and the construction industry proviso.

Prior to the 1959 amendments and the enactment of Section 8(e), it was well established that a union could not strike to obtain a hot cargo clause without violating the secondary boycott provisions of the Act. *Texas Industries, Inc.,* 112 NLRB 923, enf'd 234 F.2d 296 (5th Cir. 1956); *Bangor Building Trades Council,* 123 NLRB 484, enf'd 278 F.2d 287 (1st Cir. 1960); *Bricklayers, Masons & Plasters International Union (Selby-Batters-*

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[10] See address by then Board member and former Chairman, Boyd Leedom, before the Labor Law Section of the Illinois State Bar Association, January 19, 1962, and cases cited therein. (49 LRRM 84, 85) Member Leedom stated:

> "I have made an informal statistical survey of the decisions issued since April 14, 1961, the day that President Kennedy made his latest appointment to the Board. According to my figures, there has been departure from precedent in thirteen cases."

by & Co.), 125 NLRB 1179. This Court's decision in *Sand Door* remains the cornerstone of that principle. In that case, Justice Frankfurter, speaking for the Court, stated that a union is free to approach an employer to persuade him to sign a "hot cargo" clause *voluntarily*, and thus to engage in a boycott so long as the union refrains from coercive activity in its enforcement.[11] In dissent, Justice Douglas, joined by Chief Justice Warren and Justice Black, reasoned that if the clause was the product of *voluntary collective bargaining*, it should be enforceable, just as any other provision of a collective bargaining agreement. Accordingly, before 1959, "hot cargo" agreements could only be obtained *voluntarily and in an atmosphere free from coercion.*

Section 8(e) outlawed all "hot cargo" argreements *even if voluntary in nature*, with two exceptions—the first, a sweeping exemption for the garment industry, exempting that industry from the prohibitions of both Section 8(e) and Section 8(b)(4); the second, a more limited exception for the construction industry, permitting such agreements when applicable to work to be performed at the site of the construction and retaining the Section 8(b)(4) bar against coercive enforcement. *Therefore, building construction unions came away from the 1959 Congressional action in exactly the same position they were in prior to those enactments.* They were saved from the outright ban of Section 8(e), but they neither gained nor lost protection. Congress, taking a photograph of the law at it then existed, simply preserved to labor organizations in the construction industry the same rights which they enjoyed under *Sand Door* and prior court and Board decisions preceding the

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[11] *Carpenters Local 1976* v. *N.L.R.B. (Sand Door)*, 357 U.S. 93 (1958).

enactment of Section 8(e). Then Senator John F. Kennedy specifically addressed this subject in the Congressional debates. He said:

> *"Since the [8(e)] proviso does not relate to Section 8(b) (4),...*
>
> *It is not intended to change the law with respect to the judicial enforcement of these contracts, or with respect to the legality of a strike to obtain such a contract."* (emphasis added) II Legislative History of the Labor Management Reporting & Disclosure Act of 1959, 1433.

Additionally, Represenative Barden, Chairman of the House Labor Committee and a member of the Conference Committee, who presented the Conference Report to the House, stated that the first proviso to Section 8(e) would permit the making of *voluntary* agreements relating to contracting and subcontracting of work to be done at a construction site.[12]

Senator Kennedy was also careful to point out that the proviso did not change the law as enunciated by this Court in *N.L.R.B.* v. *Denver Building & Construction Trades Council,* 341 U.S. 675 (1951). Senator Kennedy said:

> "This provisio affects only Section 8(e), and therefore leaves unaffected the law developed under Section 8(b)(4). The *Denver Building Trades* (341 U.S.

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[12] Congressman Barden stated: "The first proviso under subsection (e) of section 704 permits the making of *voluntary* agreements between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done directly on the site of construction." (emphasis added) II Legislative History of Labor Management Reporting & Disclosure Act of 1959, 1715.

675) and the *Moore Drydock* (92 N.L.R.B. 547) cases would remain in force." II Legislative History of the Labor Management Reporting & Disclosure Act of 1959, at 1433.

Later pronouncements by this Court are further testimony to the continued vitality of *Denver Building Trades* and *Moore Drydock*.[13] See *N.L.R.B.* v. *Local 825, Operating Engineers*, 400 U.S. 297 (1971); *Connell Construction Co.* v. *Plumbers Local 100*, 421 U.S. 616 (1975); *Local 761, International Union of Electrical, Radio & Machine Workers, AFL-CIO* v. *N.L.R.B.*, 366 U.S. 667 (1961). The rule of each of these cases, recognizing the separate interests of each contractor and its employees on a construction project, would be very seriously eroded and eventually eradicated if unions in the construction industry were permitted to continue to *coercively* obtain agreements of the type at issue here, which would apply across craft lines and at all future jobsites of the employer. Surely, if the Court declines this opportunity to resolve this vital question, construction unions will have taken a giant step forward toward the achievement of those common situs objectives so long denied to them by Congress.[14]

In *Colson & Stevens*, the Board extensively reviewed the legislative history of the 1959 amendments and concluded that this history ". . . makes it manifest that Congress did not intend to change existing law with respect to the legality of picketing to obtain and enforce agreements of the

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[13] *Sailors Union of the Pacific*, 92 NLRB 547 (1950).

[14] See, for example, H.R. 9070, H.R. 9089, H.R. 9373, and S. 2643 (86th Congress, 1960); H.R. 10027 (89th Congress, 1965); H.R. 100 (90th and 91st Congress, 1967, 1969); H.R. 7438 (92nd Congress); and H.R. 4726 (93rd Congress, 1973).

type . . ." here involved. 137 NLRB at 1651. The Board found that proposition explicit in *Sand Door*. Then, quoting Senator Kennedy's statement that the Section 8(e) proviso was not intended to change the law with respect to the judicial enforcement of contracts excepted by the proviso, or *with respect to the legality of a strike to obtain such a contract*, the Board reached the necessary conclusion that the picketing of Colson violated Sections 8(b)(4)(A) and (B) of the Act.

The decision of the unanimous five-member Board in *Colson & Stevens* convincingly stated:

> "This reading, we believe, gives hospitable scope to the competing interests which Congress here sought to balance. To construe the statute as condemning coercive enforcement of agreements of the type here involved, but condoning coercion as a means of obtaining such agreements, would in our view be to pay observance to slavish literalism and to frustrate the congressional objective. The Supreme Court periodically reminds us of the familiar principle of statutory construction that words used in a statute should not be literally construed, even where their literary purport is clear, *if such construction would lead to absurd and incongruous results plainly at variance with the policies of the legislation as a whole. United States* v. *American Trucking Association*, 310 U.S. 534, 542-543; *Ozawa* v. *United States*, 260 U.S. 178, 194." 137 NLRB at 1652, n. 7 (emphasis added).

It is illogical to assume that the same Congress, which carefully drafted Section 8(f) of the Act[15] so as to pro-

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[15] 29 U.S.C. §158(f).

hibit coercion to obtain a pre-hire agreement from a primary employer, would allow coercion to obtain a protected "hot cargo" agreement in an admittedly secondary context. Furthermore, it makes no sense whatsoever to permit a union to shut down construction over a broad area, possibly covering many states and hundreds of sites, valued perhaps in the billions of dollars, in an effort to obtain an 8(e) clause, while prohibiting that same union from striking one single job to enforce the clause once obtained. Now, for the first and perhaps last time, this Court has an opportunity to put the law back on the track and to effectuate the Congressional design so clearly mirrored in the legislative history of the 1959 amendments.

CONCLUSION

For all of the foregoing reasons and based upon the record as a whole, the Court is urged to grant petitioner's request for certiorari on all of the issues raised, but most particularly with respect to Question No. 3, to which this brief is addressed.

Respectfully submitted,

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